

WARREN THOMPSON,)
)
 Plaintiff,) No. CV-11-3042-CI
)
 v.) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
)
 MICHAEL J. ASTRUE, Commissioner)
 of Social Security,)
)
 Defendant.)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 14, 16. Attorney D. James Tree represents Warren E. Thompson (Plaintiff); Special Assistant United States Attorney Thomas S. Inman represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's Motion for Summary Judgment.

On August 28, 2006, Plaintiff protectively filed both a Title II application for a period of disability and disability insurance benefits and a Title XVI application for supplemental security income, alleging disability beginning October 4, 2005. Tr. 14; 119. In his application for benefits, Plaintiff reported that he stopped working due to low back injury, right shoulder injury, depression and hearing loss. Tr. 123. Plaintiff's claim was denied initially

1 and on reconsideration, and he requested a hearing before an
2 administrative law judge (ALJ). Tr. 72-102. A hearing was held on
3 November 4, 2009, at which Vocational Expert Scott Whitmer, and
4 Plaintiff, who was represented by counsel, testified. Tr. 29-67.
5 ALJ Gene Duncan presided. Tr. 29. The ALJ denied benefits on
6 January 8, 2010. Tr. 14-24. The instant matter is before this
7 court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 47 years old, and lived in a camper on a
12 friend's property in Zillah, Washington. Tr. 34; 36. He graduated
13 from high school and immediately began working in agricultural
14 warehouses. Tr. 49.

15 In October 2005, he was working at a fruit packing shed as a
16 line mechanic, "taking care of machines and segregating apple
17 boxes," when he hurt his shoulder. Tr. 37-38. He testified that he
18 was off work for five days, he filed a Labor and Industries claim,
19 but when he returned with a doctor's excuse, he was fired. Tr. 38.
20 Plaintiff said that his civil action against his employer was
21 ongoing. Tr. 38-39. He said his shoulder still hurt, but his back
22 pain was worse. Tr. 40. Plaintiff said his daily pain is between
23 a four and six, but on a bad day, the pain is a ten. Tr. 42. He
24 said he can sit for about 45 minutes before he has to stand, and he
25 can stand about 20 to 25 minutes at a time. Tr. 44. Plaintiff
26 testified that on an average day, he spends two to three hours lying
27 down. Tr. 50.

28 At the hearing, Plaintiff testified that his last treatment for

1 his back was in late 2007 with David Hibbs, ARNP, but he also
2 asserted that he had visited a doctor after 2008. Tr. 32-34; 41-42.
3 No evidence of treatment in 2008 was included in the record.

4 While Plaintiff was living with his girlfriend, his daily
5 activities included getting the kids ready for school, caring for
6 three dogs, light housekeeping, and supervising the children when
7 they were home from school. Tr. 130; 139.

8 Plaintiff estimated he had been arrested between six and seven
9 times. Tr. 21. Plaintiff testified that he was incarcerated in
10 2001 for selling cocaine in 1987. Tr. 39. He smokes four to five
11 cigarettes per day. Tr. 194.

12 ADMINISTRATIVE DECISION

13 At step one, ALJ Duncan found Plaintiff met the insured status
14 requirements of the Social Security Act through December 31, 2009,
15 and he had not engaged in substantial gainful activity since October
16 4, 2005, the onset date. Tr. 16. At step two, he found Plaintiff
17 had the following severe impairments: right shoulder strain, mild
18 degenerative changes in the lumbar spine; depression, and pain
19 disorder due to psychological factors and general medical condition.
20 Tr. 16. At step three, the ALJ determined Plaintiff's impairments,
21 alone and in combination, did not meet or medically equal one of the
22 listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R.
23 416.920(d), 416.925 and 416.926). Tr. 19. In step four findings,
24 the ALJ found Plaintiff's statements regarding pain and limitations
25 were not credible to the extent they were inconsistent with the
26 Residual Functional Capacity ("RFC") findings. Tr. 21. The ALJ
27 found that Plaintiff was unable to perform any past relevant work,
28 and has the RFC to perform light work with the following

1 limitations:

2 He can stand and/or walk 4 hours in an 8-hour day. He
3 would require a sit/stand option hourly. He can
4 occasionally engage in kneeling or crouching. He should
5 not climb ladders or work at heights. He cannot work
6 overhead or reach out to the side. He is capable of
7 simple, routine work with superficial public contact. He
8 should avoid routine interaction with others. He requires
9 independent work, not in coordination with coworkers. He
10 should not work on a conveyor belt or do security work or
11 be in charge of other's safety. He would be absent about
12 8 hours a month for medical reasons. He would be off task
13 4% of a work day.

14 Tr. 20.

15 Finally, after considering Plaintiff's age, education, work
16 experience, and residual functional capacity, the ALJ concluded jobs
17 exist in significant numbers in the national economy that the
18 Plaintiff can perform, such as escort vehicle driver, charge account
19 clerk, and repair order clerk. Tr. 23.

20 STANDARD OF REVIEW

21 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
22 court set out the standard of review:

23 A district court's order upholding the Commissioner's
24 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
25 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
26 Commissioner may be reversed only if it is not supported
27 by substantial evidence or if it is based on legal error.
28 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed

3 It is the role of the trier of fact, not this court, to resolve
4 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
5 supports more than one rational interpretation, the court may not
6 substitute its judgment for that of the Commissioner. *Tackett*, 180
7 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
8 Nevertheless, a decision supported by substantial evidence will
9 still be set aside if the proper legal standards were not applied in
0 weighing the evidence and making the decision. *Browner v. Secretary*
1 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
2 substantial evidence exists to support the administrative findings,
3 or if conflicting evidence exists that will support a finding of
4 either disability or non-disability, the Commissioner's
5 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
6 1230 (9th Cir. 1987).

8 The Commissioner has established a five-step sequential
9 evaluation process for determining whether a person is disabled. 20
0 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
1 137, 140-42 (1987). In steps one through four, the burden of proof
2 rests upon the claimant to establish a prima facie case of
3 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.
4 This burden is met once a claimant establishes that a physical or
5 mental impairment prevents him from engaging in his previous
6 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a
7 claimant cannot do his past relevant work, the ALJ proceeds to step
8 five, and the burden shifts to the Commissioner to show that (1) the

1 claimant can make an adjustment to other work; and (2) specific jobs
2 exist in the national economy which claimant can perform. *Batson v.*
3 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).
4 If a claimant cannot make an adjustment to other work in the
5 national economy, a finding of "disabled" is made. 20 C.F.R. §§
6 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

7 ISSUES

8 Plaintiff contends that the ALJ erred by: (1) finding Plaintiff
9 was not credible; (2) improperly rejecting lay witness testimony;
10 and (3) failing to meet his Step 5 burden. ECF No. 15 at 7.
11 Defendant contends the ALJ's decision is supported by substantial
12 evidence and free of legal error. ECF No. 17.

13 DISCUSSION

14 A. Credibility.

15 Plaintiff contends that the ALJ failed to specifically identify
16 what testimony was not credible, and failed to provide "clear and
17 convincing" reasons for rejecting Plaintiff's subjective complaints.
18 ECF No. 15 at 11-15. Also, Plaintiff argues that the ALJ improperly
19 rejected "the severity of Plaintiff's symptoms based upon the
20 assertion that they were not supported by objective clinical
21 findings." ECF No. 15 at 14. With regard to Plaintiff's pain
22 testimony, the ALJ found that while Plaintiff's impairments could
23 cause the alleged symptoms, the claimant's statements about the
24 intensity, persistence and limiting effects of the symptoms was not
25 credible. Tr. 21. As discussed below, the ALJ provided several
26 "clear and convincing" reasons that supported the conclusion that
27 Plaintiff lacked credibility.

28 As stated earlier, the ALJ is responsible for determining

1 credibility, resolving conflicts in medical testimony, and resolving
2 ambiguities. *Andrews*, 53 F.3d at 1039. The ALJ's findings must be
3 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d
4 1229, 1231 (9th Cir. 1990). After a claimant produces medical
5 evidence of an underlying impairment, the Commissioner may not
6 discredit the claimant's testimony as to the severity of symptoms
7 merely because it is unsupported by objective medical evidence.
8 *Reddick v. Chater*, 157 F.3d 715 (9th Cir. 1998). *Bunnell v. Sullivan*
9 947 F.2d 341, 343 (9th Cir. 1991). Unless affirmative evidence
10 exists that shows that the claimant is malingering, the
11 Commissioner's reasons for rejecting the claimant's testimony must
12 be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
13 Cir. 1996)(internal quotation marks omitted); *Swenson*, 876 F.2d at
14 687. "General findings are insufficient; rather, the ALJ must
15 identify what testimony is not credible and what evidence undermines
16 the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
17 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

18 To determine whether the claimant's testimony regarding the
19 severity of her symptoms is credible, the ALJ may consider, for
20 example: (1) ordinary techniques of credibility evaluation, such as
21 the claimant's reputation for lying, prior inconsistent statements
22 concerning the symptoms, and other testimony by the claimant that
23 appears less than candid; (2) unexplained or inadequately explained
24 failure to seek treatment or to follow a prescribed course of
25 treatment; and (3) the claimant's daily activities. See, e.g., *Fair*
26 *v. Bowen*, 885 F.2d 597, 602-04 (9th Cir. 1989).

27 In evaluating the credibility of the symptom testimony, the ALJ
28 must also consider the factors set out in SSR 88-13. See *Bunnell*,

1 947 F.2d at 346. Those factors include the claimant's work record
2 and observations of treating and examining physicians and other
3 third parties regarding, among other matters, the nature, onset,
4 duration, and frequency of the claimant's symptom, precipitating and
5 aggravating factors, functional restrictions caused by the symptoms,
6 and the claimant's daily activities. See Social Security Ruling
7 ("SSR") 88-13.

8 Plaintiff's argument that the ALJ did not specify which
9 testimony was not credible lacks merit. For example, as the ALJ
10 found, after Plaintiff's injury, he was successfully treated and
11 released to work for fourteen days of modified work, and after that
12 he was medically released to return to work without restrictions.
13 Tr. 21; Tr. 185.

14 Additionally, as the ALJ noted, no records existed that
15 Plaintiff was treated for his pain after 2007. Tr. 21. The failure
16 to seek treatment is a factor to consider in determining
17 credibility. *Fair*, 885 F.2d at 603 (while a number of good reasons
18 exist for not seeking treatment, the claimant's failure to assert
19 one, or a finding by the ALJ that the proffered reason is not
20 believable, can cast doubt on the sincerity of the claimant's pain
21 testimony).

22 The ALJ also noted Dr. Seltzer's observation that Plaintiff's
23 pain behavior appeared "suddenly" during the exam. Tr. 21. The
24 relevant treatment notes stated:

25 Examination of the right shoulder is marked by significant
26 pain manifestation behavior, functional limitations, and
27 grimaces, and complaints of pain which suddenly appeared
28 during the examination. There is no evidence of
mechanical block to movement of the right shoulder. The
claimant guards because of complaints of pain. I do not
feel any instability present in his right shoulder.

1 Overall, it is felt that strength in the right shoulder is
2 5/5. I cannot localize any specific areas of weakness.
3 Overall symmetry is within normal limits. I do not see
any atrophy or any signs of dysfunction of biceps or
triceps.

4 Tr. 296. Dr. Seltzer's note indicates that he found no physical
5 objective impairment to substantiate Plaintiff's complaints of pain.

6 Finally, the ALJ noted that the objective findings establish
7 Plaintiff has an injury that is usually treated conservatively with
8 physical therapy or steroid shots. Tr. 21. On May 16, 2006,
9 Plaintiff was examined by Alan Patterson, M.D., an orthopedist. Tr.
10 236-40. Dr. Peterson amended his report on June 5, 2006, after he
11 reviewed an MRI completed on May 23, 2006. Tr. 239-40. Dr.
12 Peterson noted that the MRI of the right shoulder was normal,
13 diagnosis was sprain, with possible impingement syndrome. Tr. 239-
14 40. Dr. Peterson opined that Plaintiff had reached his maximum
15 medical improvement, and suffered from a two percent impairment of
16 the upper extremity due to slight loss of internal rotation of the
17 right shoulder. Tr. 240.

18 A May 6, 2007, MRI of Plaintiff's lumbar spine revealed he had
19 mild degenerative disc change with annular fissure at the L5-S1 and
20 L2-3 levels. Tr. 231. On that same day, an MRI of Plaintiff's
21 right shoulder revealed a small amount of fluid in the biceps tendon
22 sheath, and a possible small tear or partial detachment of the
23 labrum. Tr. 232. On September 12, 2007, S. Daniel Seltzer, M.D.,
24 agreed that Plaintiff's 2006 MRI of his right shoulder was "within
25 normal limits" and Plaintiff should undergo MR arthrography to
26 further evaluate his condition. Tr. 301.

27 Finally, the ALJ noted that while Plaintiff testified he could
28 sit for only 45 minutes at a time, and he had to lie down for two to

1 three hours per day, he never mentioned this to Dr. Ho or Dr.
2 Williams, and he sat comfortably throughout the one hour, fifteen
3 minute hearing. Tr. 21. As the ALJ points out, no evidence in the
4 record supports Plaintiff's claim that he requires lying supine for
5 two to three hours per day. He neither related this information to
6 his various medical providers, nor did his lay witness corroborate
7 such a severe limitation. An ALJ properly relies upon prior
8 inconsistent statements related to symptoms. *Smolen v. Chater*, 80
9 F.3d 1273, 1281 (9th Cir. 1996). Therefore, the ALJ's conclusion
10 that Plaintiff was not entirely credible was supported by
11 substantial evidence in the record.

12 **B. Lay Witness Testimony.**

13 Plaintiff contends that the ALJ erred by failing to provide
14 "germane" reasons for rejecting the testimony of his lay witness and
15 by erroneously finding that the testimony was consistent with the
16 RFC. ECF No. 15 at 15.

17 In determining whether a claimant is disabled, an ALJ must
18 consider lay witness testimony concerning a claimant's ability to
19 work. *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th
20 Cir. 2006); *Smolen*, 80 F.3d at 1288; 20 C.F.R. §§ 404.1513(d)(4) &
21 (e), and 416(d)(4) & (e). The ALJ may discount the testimony of lay
22 witnesses only if he gives "reasons that are germane to each
23 witness." *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685,
24 694 (9th Cir. 2009) (citing *Dodrill*, 12 F.3d at 919); see also *Lewis*
25 *v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a
26 claimant's symptoms is competent evidence that an ALJ must take into
27 account, unless he or she expressly determines to disregard such
28 testimony and gives reasons germane to each witness for doing so."

1 (citations omitted)).

2 The ALJ stated that he carefully considered the statement of
3 Plaintiff's girlfriend, Naomi Patton. Tr. 21. The ALJ found that
4 her statement was consistent with Plaintiff's RFC. Tr. 21. The ALJ
5 noted that Ms. Patton's statement reflected Plaintiff's daily
6 activities of taking kids to school, caring for pets, doing dishes,
7 making dinner and light housekeeping. Tr. 21. Ms. Patton also
8 noted that Plaintiff did not sleep well at night, no longer played
9 basketball or socialized with friends due to his back, and he could
10 not lift, and he could engage in only very limited sitting and
11 standing. Tr. 21.

12 The majority of Ms. Patton's assertions about Plaintiff's
13 limitations are compatible with Plaintiff's RFC. Ms. Patton's
14 assertions that Plaintiff was unable to lift and sit or stand for
15 only a few minutes at a time were unsupported by the record and were
16 contradicted by Plaintiff's own testimony, and by the medical
17 records. Tr. 44; 135; 197; 201; 235. Where the ALJ has properly
18 discounted a claimant's subjective symptom testimony, the ALJ may
19 subsequently reject lay witness testimony that is based, in part, on
20 the same or similar subjective complaints. *See Valentine*, 574 F.3d
21 at 694. The ALJ's failure to directly address and reject this
22 portion of the lay witness testimony was harmless error because the
23 unsupported assertions would not have changed the ultimate
24 nondisability determination. *Molina v. Astrue*, 674 F.3d 1104, 1117
25 (9th Cir. 2012). As a result, the ALJ did not err by implicitly
26 rejecting this portion of Ms. Patton's testimony.

27 **C. Step Five.**

28 Plaintiff contends that the ALJ erred by relying upon an

1 incomplete hypothetical that was posed to the VE. ECF No. 15 at 10.
2 Specifically, Plaintiff argues the ALJ failed to provide a reason
3 for rejecting the state agency psychologist's opinion that he would
4 not be consistently on time for work and he would not have a good
5 attendance record. ECF No. 15 at 10-11.

6 In December 2006, Rita Flanagan, Ph.D., assessed Plaintiff as
7 having no significant limitations, with the exception of a single
8 "moderate" limitation in the "ability to perform activities within
9 a schedule, maintain regular attendance, and be punctual within
10 customary tolerances." Tr. 213. About Plaintiff's functional
11 capacity assessment, Dr. Flanagan opined, "Muscle pain in his back
12 may limit his ability to be consistently on time or have good
13 attendance." Tr. 215. The ALJ did not specifically address Dr.
14 Flanagan's opinion. Instead, the ALJ stated that the "opinions of
15 non-examining State Agency consultants . . . tend to support the
16 undersigned's conclusions, however, additional evidence was received
17 subsequent to their opinions, including testimony at the hearing,
18 making a new determination necessary in this case." Tr. 22.

19 As a matter of law, more weight is given to a treating
20 physician's opinion than to that of a non-treating physician because
21 a treating physician "is employed to cure and has a greater
22 opportunity to know and observe the patient as an individual."
23 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). A treating
24 physician's opinion, however, is not necessarily conclusive as to
25 either a physical condition or the ultimate issue of disability, and
26 can be rejected, whether or not that opinion is contradicted.
27 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a
28 treating or examining physician, the ALJ must give "clear and

1 convincing" reasons for doing so if the opinion is not contradicted
2 by other evidence, and "specific" and "legitimate" reasons if it is.
3 *Reddick*, 157 F.3d at 725. "This can be done by setting out a
4 detailed and thorough summary of the facts and conflicting clinical
5 evidence, stating his interpretation thereof, and making findings."
6 *Id.* (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than
7 merely state his conclusions: "He must set forth his own
8 interpretations and explain why they, rather than the doctors', are
9 correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th
10 Cir. 1988)). The ALJ's conclusions must be supported by substantial
11 evidence. *Reddick*, 157 F.3d at 725.

12 Opinions from non-examining medical sources are to be given
13 less weight than treating or examining doctors. *Lester*, 81 F.3d at
14 831. However, an ALJ must always evaluate the opinions from such
15 sources and may not simply ignore them. In other words, an ALJ must
16 evaluate the opinion of a non-examining source and explain the
17 weight given to it. SSR 96-6p. Although an ALJ generally gives
18 more weight to an examining doctor's opinion than to a non-examining
19 doctor's opinion, a non-examining doctor's opinion may nonetheless
20 constitute substantial evidence if it is consistent with other
21 independent evidence in the record. *Thomas v. Barnhart*, 278 F.3d
22 947, 957 (9th Cir. 2002).

23 In this case, the ALJ failed to explain the weight given to the
24 medical sources and failed to provide specific and legitimate
25 reasons for rejecting Dr. Flanagan's assessment about Plaintiff's
26 limited ability to work consistently and arrive timely. The ALJ
27 stated simply that the opinions of the non-examining consultants
28 tended to support his conclusions, but "additional evidence,"

1 including testimony at the hearing, required a "new determination"
2 be made. Tr. 22. The ALJ failed to individually address the
3 medical opinions, and he failed to specify, other than the hearing
4 testimony, the evidence that necessitated a new determination. The
5 ALJ's lack of specificity in his decision precludes the court from
6 ascertaining, with certainty, the ALJ's rationale. See *Ceguerra v.*
7 *Secretary of HHS*, 933 F.2d 735, 738 (9th Cir. 1991) ("A reviewing
8 court can evaluate an agency's decision only on the grounds
9 articulated by the agency."). In assessing a claimant's residual
10 functional capacity, an ALJ must consider and evaluate the opinions
11 of state agency physicians or psychologists using all factors set
12 forth in the regulations for analyzing opinion evidence. SSR 96-6p.
13 The ALJ did not do so here and the reasoning provided was vague and
14 did not contain specific and legitimate reasons. Consequently, the
15 ALJ erred in failing to address, and by implicitly rejecting, Dr.
16 Flanagan's opinion about Plaintiff's limitations. Given the
17 deficient nature of the ALJ's opinion, this case must be remanded
18 for further proceedings. On remand, the ALJ shall discuss
19 Plaintiff's limitations and specifically explain the weight given to
20 all medical source opinions. The ALJ should also gather additional
21 medical evidence, if necessary, to evaluate Plaintiff's limitations
22 in the ability to perform activities within a schedule, maintain
23 regular attendance, and be punctual within customary tolerances.

24 CONCLUSION

25 Based on the foregoing, the court finds that the ALJ's decision
26 is not free of legal error and is not supported by substantial
27 evidence. The decision is therefore **REVERSED** and the case is
28 **REMANDED** for further proceedings consistent with this opinion.

1 Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
4 **GRANTED** and the matter is **REMANDED** to the Commissioner for
5 additional proceedings.

6 2. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
7 **DENIED**;

8 3. An application for attorney fees may be filed by separate
9 motion.

10 The District Court Executive is directed to file this Order and
11 provide a copy to counsel for Plaintiff and Defendant. Judgment
12 shall be entered for Plaintiff, and the file shall be **CLOSED**.

13 DATED December 13, 2012.

14
15 S/ CYNTHIA IMBROGNO
16 UNITED STATES MAGISTRATE JUDGE
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